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September 5, 2018

REDACTED – FOR PUBLIC INSPECTION

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141

Dear Ms. Dortch:

Pursuant to the procedures outlined in the Protective Order[1] adopted in the above referenced proceeding, attached is the Redacted version of the Comments of AT&T in the above-captioned proceeding. AT&T is filing the Highly Confidential version of these Comments under separate cover.

Thank you for your assistance. Please contact me at 202-736-8689 or cshenk@sidley.com if you have any questions or concerns.

Sincerely,

/s/ Christopher T. Shenk
Partner

[1] Protective Order, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, DA 18-575, ¶ 5 (rel. June 1, 2018).

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance	)	WC Docket No. 18-141
Pursuant to 47 U.S.C. § 160(c) to	)	
Accelerate Investment in Broadband and	)	
Next-Generation Networks	)	

COMMENTS OF AT&T

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COMMENTS OF AT&T

Pursuant to the Public Notice released on May 8, 2018[1] and Order released on June 1, 2018,[2] AT&T hereby submits these Reply Comments in support of USTelecom's Petition for Forbearance.[3]

INTRODUCTION AND SUMMARY

Over the past two decades, an avalanche of facilities-based competitive entry and a shift away from TDM to IP-based technology has transformed the communications marketplace. As a result of these changes, the vast majority of services historically provided using TDM technology over copper facilities are now provided by a wide range of facilities-based providers—including cable companies, CLECs, ILECs, wireless providers, and others—using IP technology over

[1] Public Notice, *Pleading Cycle Established for Comments on USTelecom's Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section of 271 and 272 Requirements*, WC Docket No. 18-141, DA 18-475 (May 8, 2018).

[2] Order, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, DA 18-574 (June 1, 2018).

[3] Petition for Forbearance of USTelecom – The Broadband Association, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (May 4, 2018) ("Petition").

various wireline broadband Internet and wireless facilities, which are not subject to Section 251(c). Consumers today therefore typically have a number of choices for their voice and data services, and fewer and fewer are choosing the types of legacy TDM-based services at issue here. Indeed, the portion of consumers that purchase services using Section 251(c) facilities as inputs is miniscule. For example, CLECs using unbundled loops account for only two percent of all fixed (wireline) lines—a percentage that drops to one-half of one percent once wireless is factored in. And CLECs admit that they barely use avoided cost resale services.

The continued application of Section 251(c) is thus not remotely necessary to serve its original purpose of jumpstarting competition. Competition is here, widespread, and durable. All that is left are the well-recognized harms associated with these requirements, including reduced investment incentives and delays in transitioning to next-generation services.[4] Indeed, the record demonstrates that forbearing from these provisions will, over the next decade, produce $1 billion for consumers, spur $1.2-$1.8 billion in additional investment, and lead to thousands of new jobs and hundreds of millions of dollars in annual increases to GDP.[5]

The comments of opponents to the Petition ("Opponents") side-step these dispositive facts, and argue that the tiny portion of Section 251(c) facilities used by CLECs to serve end-users justifies the continued application of those regulations. But under the forbearance standard, the critical question is whether these requirements remain "necessary" to protect consumers, rates, and

[4] *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J., concurring in part and dissenting in part) ("[M]andatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource.").

[5] Hal Singer, Kevin Caves, Ed Naef, Micah Sachs, *Assessing the Impact of Forbearance from 251(c)(3) on Consumers, Capital Investment, and Jobs* (May 2018) ("Economic Analysis of Forbearance") attached to Petition as Appendix B.

the public interest—not whether individual CLECs still sometimes use the regulated facilities. The forbearance standard is unquestionably satisfied here. The Section 251(c) provisions are clearly not needed to protect consumers, given that almost none of them even purchase facilities that rely on the Section 251(c) requirements. They are not necessary to ensure just and reasonable rates because the fiercely competitive marketplace does that. And they are not necessary to protect the public interest because the competitive dynamics of facilities-based competition are irreversible and do not depend on Section 251(c). Forbearing from Section 251(c) requirements could only enhance competition by eliminating regulations that are costly and undermine incentives to invest.

Opponents' reliance on the *Qwest Phoenix Order* is likewise misplaced.[6] Contrary to Opponents' arguments, the D.C Circuit has made clear that the *statute* does not require the Commission to undertake any particular geographic or product market analysis when considering a forbearance petition,[7] and thus Opponents' assertions that the Commission is required follow the geographic and product market approach used in the *Qwest Phoenix Order* is wrong. But even under the *Qwest Phoenix* test, the question is simply whether ILECs retain market power for TDM-based services.[8] On today's facts, when TDM services have only a small market share, there is no need to conduct a burdensome, granular analysis as if there were a genuine question as to whether any given ILEC might still have market power over services that use legacy TDM-based facilities.

Opponents' remaining arguments mainly rehash the sorts of arguments that were made when the Commission delisted the UNE-Platform on a nationwide basis a decade ago, but contrary to the CLECs' predictions then, competition continued to grow. Further, these arguments are even

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[6] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd. 8622 (2010) ("*Qwest Phoenix Order*").

[7] *See Earthlink, Inc. v. FCC*, 462 F.3d 1, at 8 (D.C. Cir. 2006).

[8] *See Qwest Phoenix Order* ¶¶ 37-38.

less persuasive today, as is apparent when reviewing marketplace conditions for the relevant facilities: (1) DS1 and DS3 loops and transport; (2) DS0 UNE loops and resale; and (3) dark fiber transport.

DS1 and DS3 Loops and Transport. Unbundled access to DS1 and DS3 loop and transport facilities meet the statutory test for forbearance. These facilities have historically been subject to two regulatory regimes—price caps and UNEs—and both aimed to impose *ex ante* price regulation only in geographic areas where competition has not developed or is not likely to develop. To identify competitive areas, the Commission used proxies (*e.g.*, where competitors had collocated facilities in ILEC offices) to balance the need for accuracy against administrability. The Commission has always recognized that these proxy-based tests were not as accurate as a more granular building-by-building test. Recently, the Commission initiated one of the largest data collections in its history specifically to identify competitive areas on a building-by-building basis, which culminated with one of the most detailed "competitive market tests" ever developed by the Commission for DS1 and DS3 services. Using these building-level data, the test identifies counties where DS1 and DS3 competition actually exists. In counties where the data showed competition, UNEs are clearly not necessary to protect consumers, rates, or the public interest, and forbearance is required. In counties where these data showed a lack of competition, the *BDS Order* updated price caps to levels specifically designed to be just and reasonable, and to protect consumers and the public interest. These price caps render continued UNE-based pricing regulation unnecessary and counterproductive. In all events, the data show that, the significant majority of DS1 and DS3 products purchased in non-competitive counties are purchased as BDS, not as UNEs, which further confirms that UNEs are not necessary to protect competition or the public interest.

DS0 UNE Loops and "Avoided Cost" Resale. Opponents never grapple with the fact that UNE Loops and avoided-cost resale services have declined dramatically and have essentially no impact on competition. As noted, the vast majority of local voice and data services today are provided over wireless and broadband wireline networks. As discussed below, Opponents' claims that these services continue to play an important role—mainly by arguing that they are needed to discipline ILEC rates or to facilitate broadband deployment in rural areas—do not hold up to scrutiny. The record shows that DS0 products are subject to intense competition from multiple facilities-based alternatives, which means that competition is disciplining rates. Section 251(c) regulations, therefore, serve no purpose, while continuing to impose significant burdens on ILECs and state commissions. Similarly, Opponents' claims that competitors require these services to provide broadband in rural areas where there are no alternatives are greatly overblown. According to AT&T's data, competitors barely use Section 251(c) regulated digital DS0 products in rural areas. Moreover, in the small number of examples of rural areas identified by Opponents, there are already multiple facilities-based broadband alternatives to their services.

Unbundled Dark Fiber Transport. Only a handful of Opponents argue that the Commission should retain the Section 251(c)(3) unbundling requirements for dark fiber transport. These Opponents fail to acknowledge, however, that the Commission, after analyzing one of the largest sets of competitive data it has ever collected, has determined that the marketplace for transport is competitive nationwide, and that the harms of continued pricing regulation of interoffice transport far outweigh any potential benefits. Although the Eighth Circuit court of appeals vacated and remanded the Commission's finding in that regard, it did so entirely on notice grounds; it in no way questioned the merits of the Commission's conclusion. In all events, as explained below, Opponents greatly exaggerate their use of dark fiber transport.

I. OPPONENTS' ARGUMENTS ARE BASED ON FUNDAMENTAL MISUNDERSTANDINGS ABOUT THE UNBUNDLING REQUIREMENTS AND THE FORBEARANCE STANDARD.

Opponents' arguments are premised on fundamental misconceptions about the statutory standard for forbearance and the unbundling rules themselves. Contrary to Opponents' claims, (1) the forbearance standard is focused on competition and consumers, not special pleading by individual competitors, and (2) the statute permits forbearance on a nationwide basis and the Commission is not obligated to follow the *Qwest Phoenix* market power test in all circumstances.

A. Opponents Ignore The Actual Forbearance Standard And The Overwhelming Evidence That Section 251(c) Requirements Are No Longer Necessary To Ensure Competitive Outcomes.

Opponents fail to engage with the actual statutory standard for forbearance or the overall facts that are relevant to that issue. The forbearance standard is focused on whether the requirements at issue remain necessary to protect consumers, rates and the public interest—not individual competitors.[9] As part of the standard, the factors require an inquiry into whether the provisions at issue still have a "strong connection" to their purpose—which, here, was to jump-start competitive entry.[10] Opponents offer little more than a series of individual stories about how some particular CLECs use UNEs or resale—but in so doing, they have completely lost sight of the broader competitive landscape and statutory forbearance requirements.[11]

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[9] *See* 47 U.S.C. §160(a); *Earthlink, Inc.*, 462 F.3d at 4.

[10] *See, e.g., CTIA v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003); *Verizon v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014) ("there is a great deal of overlap in the three factors"). *See also* Petition at 5 (discussing the statutory history and purpose of Section 251(c) to "jump-start" competition).

[11] *See, e.g.*, Comments of CALTEL, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket 18-141, at 10-18 (filed Aug. 6, 2018) ("CALTEL Comments") (describing the use of UNEs and resale in California); Opposition of Granite to USTelecom's Forbearance Petition, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket 18-141, 32-35 (filed Aug. 6, 2018) ("Granite Comments") (discussing Granite's multi-location business and federal government customers); Opposition of

In 1996, voice and broadband services were offered largely by ILECs over narrowband wireline TDM networks, which relied on the traditional telephone architecture of copper loops. The Telecommunications Act of 1996 included various mechanisms to "jump-start" competition for local telephone service that were tailored to that time and place. To make market entry easier, the Act required ILECs to offer "unbundled access" to certain "elements" of their TDM-based networks.[12] Under this "forced sharing" regime, CLECs offered their own common-carrier local voice services, and in some instances added a Digital Subscriber Line ("DSL") service for Internet access. As an alternative, the Act also required the ILECs to offer resale of their finished local voice services, at the retail rate minus "avoided costs" (principally, billing and advertising costs).[13]

Technological and marketplace developments over the last two decades have rendered these arrangements competitively irrelevant.[14] As USTelecom demonstrates in the Petition, "non-ILEC switched access services over ILEC-provisioned UNE loops account for less than two

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MetTel, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket 18-141, at 4-6 (filed Aug. 6, 2018) ("MetTel Comments") (describing MetTel's multi-location customers); Opposition of Sonic Telecom, LLC to Petition for Forbearance of USTelecom, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket 18-141, at 4-7 (filed Aug 6, 2018) ("Sonic Comments") (description of Sonic's specific operations); Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (Aug. 6, 2018) ("INCOMPAS *et al.* Opposition"), Attachment 4, Declaration of Douglas Denney (describing Zayo Group's services in the urban west).

[12] *See* 47 U.S.C. § 251(c)(3); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999).

[13] *See* 47 U.S.C. § 251(c)(4); 47 C.F.R. § 51.609.

[14] *See, e.g.*, Petition at 7-19; Comments of Verizon, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, at 8-20 (Aug. 6, 2018) ("Verizon Comments"); Adres V. Lerner, An Economic Analysis of the Impact of Forbearance from Section 251(c)(3) on Competition and Investments, at 9-25 (August 6, 2018), attached to Verizon Comments as Exhibit A ("Lerner Paper").

percent of all fixed lines," and adding in wireless lines, "less than one-half of one percent of all connections."[15] Further, as discussed below, CLECs admit that they barely use avoided-cost resale services today. None of this is surprising. The marketplace has shifted to next-generation IP-based services and multiple facilities-based providers, including cable companies, CLECs, wireless providers and others, have deployed networks offering those services. Indeed, by the end of this year, more than sixty percent of consumers will not even have a wireline connection and instead will use mobile wireless services for broadband and voice services.[16] And, on the wireline side, consumers have shifted to non-TDM based services for broadband and voice. Indeed, most voice calls are VoIP calls that ride on the packet-based local networks of wireline broadband Internet access providers,[17] and cable companies, not ILECs, are the dominant providers of such VoIP services.[18]

Opponents never come to grips with the implications of this fundamental shift in the marketplace on the statutory forbearance standard as it applies to Section 251(c). Instead, they recite various isolated examples of the way individual CLECs supposedly use the few unbundled loops and resale services that remain today.[19] But the fact that some individual CLECs may find it useful or advantageous to use these arrangements in individual situations is not the question

[15] *See* Petition at 8.

[16] *See id.*

[17] *See id.*

[18] *See, e.g.*, FCC, *Voice Telephone Services: Status as of Dec. 31, 2016*, Table 1 (indicating that 62% of "All Other interconnected VoIP by last-mile delivery medium" is cable).

[19] *See supra* n.11.

before the Commission. Forbearance is mandatory where, as here, the requirements at issue are no longer necessary to ensure that *consumers* get the benefits of *competition*.[20]

Opponents also fail to grapple with the fact that the cost-benefit analysis is tipped entirely in favor of forbearance. The record shows that unbundled access to transmission links on legacy TDM networks plays essentially no role today in ensuring competitive outcomes for consumers, nor does statutory resale.[21] Accordingly, these Section 251(c) requirements provide little or no benefits that are cognizable under the forbearance statute, while the costs of these forced-sharing regimes, both in diminished investment incentives and what Justice Breyer called "the tangled management inherent in shared use of a common resource," are substantial.[22] Indeed, the record demonstrates that granting forbearance will, over the next decade, produce $1 billion for consumers, spur $1.2-$1.8 billion in additional investment, and lead to thousands of new jobs and hundreds of millions of dollars in annual increases to GDP.[23]

Opponents have thus lost the forest for a few trees. The forbearance statute requires the Commission to forbear from statutory requirements that are no longer necessary to protect consumers, rates, and the public interest. In today's marketplace, where non-TDM-based services offered by multiple alternative facilities-based providers dominate the marketplace, continued regulation of TDM-based services is clearly no longer necessary to promote those goals, and, in fact, such regulation is affirmatively harmful. On this record, forbearance is mandatory.

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[20] The same is true of "avoided-cost" resale. As discussed below, the CLECs' own comments confirm that CLECs rely overwhelmingly today on commercially negotiated UNE-P replacement services rather than statutory resale. CLECs have never relied very heavily on Section 251(c)(4) resale, and it is no longer necessary today to ensure competitive outcomes.

[21] *See* Petition at 7-19.

[22] *U.S. Telecom Ass'n*, 290 F.3d at 429.

[23] *See generally* Economic Analysis of Forbearance.

B. Opponents' Reliance On The *Qwest Phoenix* Order Is Misplaced.

A number of Opponents claim that USTelecom has failed to make its case because its petition does not present evidence in the precise format of the Commission's *Qwest Phoenix Order*.[24] These Opponents claim that any petition seeking forbearance from Section 251(c) requirements must make separate showings for a large number of different geographic and product markets, and that USTelecom's request for nationwide relief should therefore be rejected. Some Opponents even seek summary dismissal of the Petition for this reason.[25] There is no merit to these arguments.

The D.C Circuit has made clear that the forbearance statute itself does not require the Commission to undertake any particular geographic or product market analysis.[26] In considering an order granting forbearance from broadband fiber network elements under Section 271, the court rejected the argument that the statute required a "'painstaking analysis of market conditions' in 'particular geographic markets and for specific telecommunications services.'"[27] According to the D.C. Circuit, "[o]n its face, the statute imposes no particular mode of market analysis or level of

[24] *See, e.g.,* Opposition of Access Point Inc. *et al.*, *Petition of USTelecom for Forbearance Pursuant To 47 U.S.C. §160(c) to Accelerate Investment In Broadband and Next-Generation Networks*, WC Docket No. 18-141, at 6-13 (Aug. 6, 2018) ("Wholesale Voice Line Coalition Comments"); Opposition of First Communications, LLC, *Petition of USTelecom for Forbearance Pursuant To 47 U.S.C. §160(c) to Accelerate Investment In Broadband and Next-Generation Networks*, WC Docket No. 18-141, at 5-13 (Aug. 6, 2018) ("First Communications Comments).

[25] *See e.g.,* Motion for Summary Denial; Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., *Petition of USTelecom for Forbearance Pursuant To 47 U.S.C. §160(c) to Accelerate Investment In Broadband and Next-Generation Networks*, WC Docket No. 18-141, at 1 (Aug. 6, 2018) ("TPx supports INCOMPAS's Motion to Summarily Dismiss the Petition because USTelecom fails to state a *prima facie* case for forbearance even when viewed in the light most favorable to the Petition.") ("Telepacific Comments"); Granite Comments at 8, n.18 ("Granite supports the INCOMPAS Motion").

[26] *See Earthlink, Inc.*, 462 F.3d at 8.

[27] *Id*.

geographic rigor."[28] Furthermore, the statute permits the Commission to consider "classes" of service and particular geographic markets, but the court explained that these provisions mean merely that the Commission has the *discretion* to consider all or a subset of a carrier's markets or services; the statute is silent about when it might be appropriate to consider "partial" relief.[29] In short: Section 10 permits the Commission to vary its analysis "depending on the circumstances."[30] And in fact, the Commission has granted local-competition forbearance on a nationwide basis on a number of occasions.[31]

Contrary to Opponents' assertions, the mere fact that the Commission used a certain type of analysis in the *Qwest Phoenix Order* does not mean that the Commission is required to do so here. First, the *Qwest Phoenix Order* itself acknowledges, citing *Earthlink*, that the Commission "has discretion in determining the analytical approach it will use in evaluating forbearance petitions."[32] Indeed, the *Qwest Phoenix* approach was itself a change in direction from the Commission's earlier orders granting forbearance from Section 251(c), dating back to the *Qwest Omaha Order*.[33] Moreover, the statute provides sufficient flexibility such that the Commission

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[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *See, e.g., id.* at 6 ("FCC extended the same § 251 unbundling relief to fiber-to-the-curb (FTCC) loops (*i.e.*, hybrid loops in which fiber runs nearly, but not all the way, to the customers' premises) and loops to multi-dwelling units."); Memorandum Opinion and Order, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, 31 FCC Rcd. 6157, 6242 (2015); Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5612, ¶ 37 ("Today, our forbearance approach results in over 700 codified rules being inapplicable").

[32] *Qwest Phoenix Order* ¶ 24.

[33] Memorandum Opinion and Order, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd. 19415 (2005) ("*Qwest Omaha Order*").

may apply different modes of analysis in different circumstances. In the *Qwest Phoenix Order*, the Commission adopted a market power approach for "proceedings such as this one,"[34] but the Petition is quite different, because, unlike *Qwest Phoenix* or *Qwest Omaha*, it does not seek a localized forbearance action but, rather, one that is national in scope. The Commission is free to change or adapt its mode of analysis, as long as it acknowledges the change and explains why it is taking a different approach, just as it did in the *Qwest Phoenix Order*.

In all events, the *Qwest Phoenix* "test" is clearly not necessary or appropriate to analyzing USTelecom's Petition. In the *Qwest Phoenix Order*, the Commission was trying to fashion an analytical framework that would allow it to identify whether the ILEC continued to have "market power" in the provision of local services.[35] The local marketplace has changed dramatically since 2010. Unlike then, the ILECs' legacy TDM services today make up a small and rapidly shrinking fraction of the local marketplace, as the vast majority of voice and data services have migrated to wireless and broadband wireline networks—a reality that, plainly, is truly nationwide. Under these facts, there is no need to conduct the sort of "painstaking" market analysis adopted in *Qwest Phoenix* as if there were some reasonable doubt about whether any given ILEC might still be a dominant provider of local services over their TDM networks with such small market shares.[36] The data and level of analysis in USTelecom's Petition are more than adequate to support nationwide forbearance on today's facts.

[34] *Qwest Phoenix Order* ¶ 41.

[35] *See, e.g.*, *Qwest Phoenix Order* ¶¶ 37-38.

[36] *Cf. Earthlink*, 462 F.3d at 8.

II. OPPONENTS FAIL TO IDENTIFY ANY LEGITIMATE PURPOSE FOR MAINTAINING THE REGULATIONS AT ISSUE HERE.

Opponents provide no valid factual bases for denying the Petition. They merely rehash the same arguments they have made in virtually every proceeding where the Commission proposed excluding facilities from Section 251(c), and ignore dispositive facts. Commenters argue that granting forbearance will mean that they will no longer have access to the facilities they need to compete, that prices will rise, competition will decrease, and consumers will lose out. These arguments have been proven wrong time and again. For example, when the Commission proposed to eliminate the UNE-Platform from the Section 251(c) requirements on a nationwide basis, CLECs and others made these same arguments.[37] The Commission rejected them, removed UNE-P from Section 251(c),[38] and what followed was continued facilities-based entry, increased competition, lower prices and more choices—and a successful marketplace for commercially negotiated UNE-P replacement services (sometimes called commercial wholesale platform service).[39] As demonstrated below, these old arguments are even less persuasive today, as is apparent reviewing marketplace conditions for the relevant categories of facilities: (1) DS1 and DS3 loops and transport; (2) DS0 UNE loops and resale; and (3) dark fiber transport.

A. DS1 & DS3 UNE Loops And Transport.

Only a handful of Opponents attempt to argue against forbearance for DS1 and DS3 loop and transport.[40] But DS1 and DS3 UNEs unquestionably meet the statutory criteria for forbearance in light of the Commission's recent order in the Business Data Services ("BDS") proceeding and

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[37] *See, e.g.*, Order on Remand, *Unbundled Access to Network Elements*¸ 20 FCC Rcd. 2533, ¶¶ 215-221 (2005) ("*2005 UNE Remand Order*").

[38] *See id.*

[39] *See, e.g.*, Petition at 7-19; Verizon Comments at 10-14; Lerner Paper at 9-26.

[40] *See, e.g.*, Sonic Comments at 11; INCOMPAS *et al.* Opposition at 4.

marketplace realities.[41] As explained below, the Commission's *BDS Order* is based on a nationwide building-by-building analysis of competition. In counties where the data showed competition, UNEs are clearly not necessary to protect consumers, rates, or the public interest, and forbearance is required. In counties where these data showed a lack of competition, the *BDS Order* updated price caps to levels specifically designed to be just and reasonable, and to protect consumers and the public interest. These price caps render continued UNE-based pricing regulation unnecessary and counterproductive. In all events, the data show that, the significant majority of DS1 and DS3 products purchased in non-competitive counties are purchased as BDS, not as UNEs, which further confirms that UNEs are not necessary to protect competition or the public interest.

DS1 and DS3 loop and transport facilities have long been subject to dual regulatory regimes. Since 1990, the Commission has regulated DS1 and DS3 products under a price cap regime under Sections 201 and 202. When sold under this regulatory regime, these products are referred to as "special access" or "BDS." In 1996, Congress adopted Section 251(c) of the 1996 Act, which the Commission implemented in a manner that required ILECs to also make DS1 and DS3 products available as UNEs at regulated "TELRIC" rates. At the DS1 and DS3 levels, there is no meaningful difference between special access/BDS and UNEs, except the pricing. As a result, ILECs have been subject to duplicative regulatory regimes for the same DS1 and DS3 loop and transport products for the past two decades.

Most relevant here, under both regulatory regimes, the Commission has determined that *ex ante* pricing regulations are necessary only in areas that are not subject to competition. The

[41] Report and Order, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd. 3459 (2017) ("*BDS Order*").

Commission has thus removed price cap and UNE/TELRIC regulation in areas the Commission has found to be competitive. To determine which areas are competitive, the Commission has historically, for administrative ease, used "proxies." For BDS, the Commission used the presence of a facilities-based collocation in an ILEC wire center as a proxy for competition.[42] For Section 251(c) UNEs, the Commission used the number of business lines and collocations as a proxy for competition.[43] In both cases, the Commission recognized that these proxies are far from perfect, but that the Commission had to balance accuracy against administrability.[44] In addition, for both regulatory regimes, the Commission held that imposing *ex ante* pricing regulation in areas where there is competition would affirmatively harm the public interest.[45]

In the recent *BDS Order*, the Commission sought to more accurately identify areas where there is competition for DS1 and DS3 services. To that end, it required the industry to submit data that identified, among other things, the location of their networks, the capacity of those networks, and the buildings to which they had connections. After a rigorous economic analysis, the Commission used the building-level data to identify counties where competition for DS1 and DS3 services clearly exists,[46] and the Eighth Circuit recently upheld this competitive analysis as reasonable.[47] The *BDS Order* thus contains the most up-to-date and accurate determination of

[42] *See 1999 Pricing Flexibility Order*, 14 FCC Rcd. 14221, ¶¶ 24-26 (1999) ("*1999 Pricing Flexibility Order*").

[43] *See 2005 UNE Remand Order* ¶¶ 66, 143.

[44] *See id.* ¶ 5; *1999 Pricing Flexibility Order* ¶ 69.

[45] *See 2005 UNE Remand Order* ¶ 5; *1999 Pricing Flexibility Order* ¶ ¶¶ 24-26.

[46] *See BDS Order* ¶ 103.

[47] *See Citizens Telecommunications Co. of Minnesota, LLC v. FCC*, No. 17-2296 (8th Cir. Aug. 28, 2018).

competitive and non-competitive areas available to the Commission, and those determinations are far more accurate than those created by either of the previous proxy-based approaches.

Using this far more accurate method of identifying competitive and non-competitive areas, the Commission revised the price cap rules for DS1 and DS3 loop and transport services. In counties where the data showed a lack of competition for these services, the *BDS Order* retained *ex ante* price cap regulation, with price cap levels revised to reflect current marketplace conditions and thus to ensure that rates are just and reasonable.[48] In counties where the data showed sufficient competition, the *BDS Order* eliminated *ex ante* price cap regulation for these services, although they continued to be subject to Sections 201 and 202 of the Act.[49]

This comprehensive new scheme of regulation, based on granular, building-level data, means that duplicative DS1 and DS3 UNE requirements now meet the statutory test for forbearance in both the competitive and non-competitive counties. First, there can be no serious dispute that the building-level competitive analysis used in the *BDS Order* to identify counties where there is competition is a far more accurate measure than the Commission's 2005 proxy-based UNE test. The Commission and courts have already found that it is harmful to consumers and competition to make Section 251(c)(3) UNEs available in areas where those services are already subject to competition,[50] and therefore those UNEs are no longer necessary to protect

[48] *See BDS Order* ¶¶ 197-260.

[49] *See id.* ¶¶ 486-153. The Eighth Circuit has upheld the substance of the *BDS Order*, although it has remanded the revised rules governing transport on procedural notice grounds. *See Ad Hoc Telecommunications Users Committee v. FCC*, No. 17-2296 (8th Cir., August 28, 2018).

[50] *See, e.g., U.S. Telecom Ass'n*, at 429 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J., concurring in part and dissenting in part) ("[M]andatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource.").

consumers, just and reasonable rates, or the public interest.[51] The Commission is therefore required to forbear from the application of Section 251(c)(3) in counties identified as competitive in the *BDS Order*.

Second, in counties identified as non-competitive in the *BDS Order*, the Commission not only retained price caps for DS1 and DS3 services, but updated those price caps to ensure that they are just and reasonable under current marketplace conditions. The Commission's price cap rules thus already ensure that rates for DS1 and DS3 products are just and reasonable in non-competitive counties. Thus, there is no need for the Commission to place an extra layer of conflicting price regulation of those same services under Section 251(c)(3).[52]

In addition, sales data independently confirm that price capped services are sufficient to protect consumers, rates, and the public interest in counties identified as non-competitive in the *BDS Order*, leaving no legitimate role for UNEs. If price cap levels were insufficient to serve these purposes, one would expect a high percentage of DS1 and DS3 products to be UNEs as opposed to price capped services. But the opposite is true. About **[BEGIN HIGHTLY CONFIDENTIAL]** [redacted] **[END HIGHTLY CONFIDENTIAL]** of DS3 loops sold by AT&T in these non-competitive counties are price capped products, not UNEs. Similarly, about **[BEGIN HIGHTLY CONFIDENTIAL]** [redacted] **[END HIGHTLY CONFIDENTIAL]** of all DS1 loops sold by AT&T in these non-competitive counties are price capped products, not UNEs. The fact that consumers of DS1 and DS3 products overwhelming use price capped products in these

[51] *See, e.g., 1999 Pricing Flexibility Order* ¶ 69 ("the availability of alternative providers will ensure that rates are unjust and unreasonable").

[52] Indeed, there has really never been a good reason for subjecting ILECs to duplicative forms of regulation (price caps and UNE TELRIC) for what are effectively identical services.

non-competitive counties refutes any claim that UNEs remain necessary to protect consumers, rates or competition. That job is clearly being done by price caps and competition in those areas.

It also bears emphasis that retaining the Section 251(c)(3) UNE regime in light of the *BDS Order* would be affirmatively harmful, because it conflicts with, and undermines, the Commission's judgments in that order about encouraging facilities-based entry and investment. In updating the BDS regulatory regime for DS1 and DS3 services, the Commission explained that it carefully "balance[d] the benefits and costs of [*ex ante* price cap] regulation."[53] It found that "[e]x ante pricing regulation can have negative features."[54] For example, "the absence of entry in specific areas may be due to regulated prices inadvertently being set below competitive levels."[55] "Such prices make entry unprofitable, are harmful to long run incentives to invest, can lead to inefficient short run levels of production and consumption, and can prevent entry indefinitely."[56] For these and other reasons, the Commission concluded that "greater harm—primarily manifested in the discouragement of competitive entry over time—would result if we were to attempt to regulate these cases than is expected under our deregulatory approach."[57] Further, the Commission found that the regulatory balance adopted in the *BDS Order* will best "foster a market-driven transition from legacy circuit-based services to newer packet-based services and other technologies."[58]

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[53] *BDS Order* ¶ 101.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* ¶ 92.

[58] *Id.* ¶ 99.

The continued application of Section 251(c) unbundling requirements would frustrate the careful balance the Commission sought to achieve in the *BDS Order*, to the detriment of consumers and the public interest. In counties where the Commission eliminated *ex ante* price cap regulation, continued application of the Section 251(c) UNE requirements, which are effectively *ex ante* price caps for the same services, would undermine the Commission's judgment that such regulation would deter investment and delay the transition to next-generation services. Similarly, in counties where the Commission maintained and updated price caps, continued application of Section 251(c)(3) UNE requirements would undermine the Commission's judgments by super-imposing a conflicting set of *ex ante* price caps that undermine the carefully calibrated ones adopted in the *BDS Order*.

Opponents never grapple with these dispositive facts. Instead, they argue that because the *BDS Order* may, in some limited cases, have eliminated *ex ante* price cap regulation in areas within a county where there are no competitive alternatives to the ILEC service, the Commission should address that issue by retaining UNEs as a regulatory backstop.[59] But the Commission expressly addressed this issue in the *BDS Order*. The Commission acknowledged that any regulatory regime based on geography (as opposed to building-by-building regulation) would have both Type I error (no regulation where there is no competition) and Type II error (regulation where there is competition).[60] The Commission also explained its determination that Type II errors would cause the "greater harm" in today's competitive environment because of the need to encourage investment in next-generation networks. To address this issue, the Commission adopted an

[59] *See, e.g.,* Granite Comments at 25-29; Telepacific Comments at 27-29; Sonic Comments at 11-13; INCOMPAS *et al.* Opposition at 65-71; Wholesale Voice Line Coalition Comments at 25-28; First Communications Comments at 15-16.

[60] *See BDS Order* ¶¶ 135-144.

extremely sophisticated, data-driven approach designed to minimize the impact of both types of errors.[61] Opponents' argument that the Commission should maintain UNEs is an improper collateral attack on these judgments. Retaining such requirements would effectively extend the scope of pricing regulation to additional geographic areas, which would dramatically increase Type II errors (regulation where there is competition) beyond the balance the Commission expressly sought to achieve in the *BDS Order*. As the Commission found in the *BDS Order*, such over-regulation would harm consumers and the public interest. For all of these reasons, DS1 and DS3 UNEs meet the statutory prerequisites requiring forbearance.[62]

B. DS0 Products: UNE Loops (Section 251(c)(2)) and Resale (Section 251(c)(4)).

Opponents that address DS0-level services generally focus mainly (often only) on forbearance from Section 251(c)(4) avoided-cost resale requirements and take no position on forbearance from the other provisions at issue here.[63] A few Opponents also object to forbearance from the Section 251(c) UNE loop requirements.[64] None of these objections has merit.

To begin with, Opponents ignore the competitive realities of the marketplace. DS0-level products rely on copper facilities that are used mainly to provide telephone voice service and DSL

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[61] *See id.*

[62] The California Public Utilities Commission asks what impact forbearance will have on 911 network availability or costs. *See* Comments of the California Public Utilities Commission, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 18-141, at 3-4 (Aug. 6, 2018). The answer is that the relief granted by this petition would not result in any change to how the AT&T ILECs price or supply 911 database management services to CLECs.

[63] *See, e.g.*, Granite Comments at 1-2 ("As discussed herein, Granite's Opposition focuses specifically on Category 1, to the extent that includes the avoided-cost resale mandate in Section 251(c)(4) and the associated obligations in Sections 251 and 252.") (internal footnotes omitted); MetTel Comments at 1 ("As discussed herein, MetTel's opposition focuses specifically on the subset of Category 1 that includes the avoided-cost resale mandate in Section 251(c)(4) and the associated obligations in Sections 251 and 252.").

[64] *See, e.g.*, Wholesale Voice Line Coalition Comments at 22; TelePacific Comments at 31.

data services. Twenty years ago, those services were an important component of the marketplace. But that is no longer true. Today, only a tiny portion—less than 2%—of fixed lines are served by CLECs using UNEs.[65] Indeed, notwithstanding their claims that Section 251(c) DS0-level UNEs and resale are critical inputs, multiple CLECs elsewhere candidly admit that, in reality, they make very limited use of those products.[66] That is because consumers have for the past decade been rapidly transitioning to services that rely on next-generation IP-technology technology and facilities (*e.g.*, fiber, coaxial, and wireless) offered by multiple facilities-based providers, including cable companies, CLECs, ILECs, and wireless companies.[67] In this environment, where facilities-based competitive services now dominate the marketplace, there is no legitimate basis for retaining the Section 251(c) requirements and the significant harms that come along with them.

Nonetheless, Opponents argue that UNE loops and resale continue to be important to enable CLECs to provide service in rural areas where facilities-based competition is less likely to develop.[68] These arguments fail for multiple reasons. First, they are counterfactual. According to AT&T's data, CLECs purchase very few digital DS0 UNE loops (those that can be used to provide data services) in rural areas: fewer than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[65] *See* Petition at 17; Verizon Comments at 19.

[66] *See* MetTel Comments at 11; Granite Comments at 11, 25. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[67] Petition at 3-19; Verizon Comments at 16-18.

[68] *See, e.g.*, Granite Comments at 34 (describing Granite's large retail customer with rural locations); INCOMPAS *et al.* Opposition, Attachment 1 at 12-13 (referencing rural offerings of Digital West, Gorge Networks, IdeaTek, Mammoth Networks, and Socket Telecom).

[END HIGHLY CONFIDENTIAL] of the digital DS0 UNE loops sold by AT&T are in rural UNE zones.

Second, these arguments are premised on the incorrect assumption that competitors will lose access to ILEC DS0 loops if the petition is granted. ILECs will continue to offer the UNE-P replacement products they have been offering for more than a decade on a commercial basis,[69] and AT&T is committed to offering a DS0 UNE loop replacement product, which will also be offered on a commercially negotiated basis.

Third, Section 251(c) was never intended to be a mechanism for ILECs to subsidize CLEC service in rural areas on a permanent basis. Rather, Section 251(c) was intended as a stepping stone for competitors seeking to ultimately deploy their own facilities.[70] To the extent CLECs are arguing that there are rural areas where it is not economically feasible for competitors to deploy their own facilities, the proper solution is to further develop direct subsidy mechanisms,[71] not to require ILECs to continue implicitly subsidizing CLEC services in those areas through 251(c) regulatory requirements in perpetuity.

The remaining arguments made by Opponents are specific to either (1) Section 251(c)(4) avoided-cost resale or (2) the Section 251(c)(2) UNE loops.

Section 251(c)(4) Avoided-Cost Resale. Opponents of forbearance from the Section 251(c)(4) avoided-cost resale requirements concede that they purchase only a very small portion of the DS0-level services they obtain from ILECs pursuant to those requirements, and that most of the ILEC DS0 products they use are instead obtained pursuant to negotiated UNE-P replacement

[69] *Cf.* Verizon Comments at 29-30.

[70] *See, e.g.,* Petition at 4-7 (citing and quoting statements, decisions and orders by Congress, Courts, and the Commission); Verizon Comments at 4-8 (same).

[71] *See* 47 U.S.C. § 254; 47 C.F.R. Part 54.

service contracts with ILECs.[72] Accordingly, these Opponents do not—indeed cannot—legitimately claim that they substantially rely on such services. Instead, they argue that the Commission should retain the Section 251(c)(4) avoided-cost provisions because those provisions provide them leverage when negotiating the rates and terms for the DS0 services they purchase from ILECs on a negotiated commercial basis, and absent that leverage, the prices they pay for UNE-P replacement services will increase.[73]

This argument is a red herring. The forbearance statute focuses on *consumers* not individual competitors. Specifically, the statute requires forbearance from Section 251(c)(4) if it is no longer "necessary" "for the protection of consumers" or to ensure that rates are "just and reasonable and not unjustly or unreasonably discriminatory," and that forbearance is otherwise "in the public interest."[74] Avoided-cost resale meets this test. As discussed above, the record shows that consumers today have a wide range of modern facilities-based competitive alternatives to legacy TDM-based DS0 products, including IP-based services offered by cable companies, wireless providers, VoIP providers, and others. This means that if a consumer is not happy with the prices being charged for a legacy TDM-based DS0 product, the consumer has multiple alternatives to choose from. It is that competition that ensures that consumers are protected, and that prices are just, reasonable and non-discriminatory. Thus, Section 251(c)(4) is no longer necessary, and forbearance is required on that basis alone.

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[72] *See, e.g.*, Granite Comments at 25 ("Avoided-cost resale accounts for roughly [**BEGIN HIGHLY CONFIDENTIAL]** [redacted] [**END HIGHLY CONFIDENTIAL]** of TDM voice lines provided by Granite."); MetTel Comments at 11 (avoided cost resale accounts for "accounts for [**BEGIN HIGHLY CONFIDENTIAL]** [redacted] [**END HIGHLY CONFIDENTIAL]** of the TDM lines provided by MetTel.").

[73] *See, e.g.*, Granite Comments at 27; Wholesale Voice Line Coalition Comments at 26-27; MetTel Comments at 7; INCOMPAS *et al.* Opposition at 72-74.

[74] 47 U.S.C. § 160(a).

In addition, it is important to recognize that the continued application of Section 251(c)(4) is also affirmatively harmful. First, it imposes substantial costs on the industry. ILECs must maintain systems and dedicate employees to managing those regulated services, which uses resources that could otherwise be used to invest in their networks and service offerings. Second, all parties and states must expend resources determining the avoided-cost rates, which typically requires months (or longer) of state proceedings, and include experts, witnesses and attorneys to represent the various parties. Third, and most important, the avoided-cost rates adopted by states will necessarily be subject to error. There is no set formula for identifying which costs would be avoided if a retail service were sold at wholesale. The rates adopted by any specific state will necessarily be either too low or too high relative to truly competitive levels. And rates that are too low reduce the incentives of both CLECs and ILECs to invest in their own facilities and to upgrade their existing networks,[75] thus undermining the development of competition.

Finally, Opponents fail to establish their central claim that avoided-cost resale services are actually constraining ILEC rates for commercially negotiated services. They provide no economic or other studies to support those claims, and there is clearly no basis for the Commission to simply take their word for it. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[75] Economic Analysis of Forbearance at 12-25; Lerner Paper, at 8-28.

[redacted] **[END HIGHLY CONFIDENTIAL]**

DS0 UNE Loops. A few Opponents argue that the sky will fall if the Commission forbears from the application of the Section 251(c)(3) UNE loop requirements. Telepacific, for example, states that it purchases a few hundred thousand DS0 UNE loops, which it uses to sell voice and broadband services to customers in California, Nevada, and Texas.[77] It then argues that granting the Petition would make it impossible for Telepacific to continue purchasing these inputs and that it will no longer be able to serve those customers, forcing them to instead purchase services from ILECs at rates above competitive levels.[78]

[76] *See* Granite Comments at 27-28.

[77] *See* Telepacific Comments at 3.

[78] *Id.* at 3-8. *See also* Wholesale Voice Line Coalition Comments at 5 ("USTelecom's petition fails to acknowledge that there is no available substitute for the DS0 loop.").

These are, of course, the same tired arguments that CLECs made in 2005 when the Commission proposed eliminating the UNE-Platform requirement (another DS0 product).[79] In that proceeding, the CLECs also argued that without unbundling requirements they would lose access to those facilities and consumers would have no choice but to purchase their voice and data services from ILECs.[80] The Commission rejected those arguments, and was proven correct. As discussed above, when the Commission eliminated the UNE-P requirements, ILECs offered a substitute product—known as commercial wholesale platform service—with the same capabilities pursuant to commercially negotiated terms and conditions, which CLECs have since relied upon as replacements to the regulated UNE-Platform services. Far from hindering CLECs, they continued to dramatically expand their networks and service offerings, and continued to win customers; at the same time, cable companies, mobile wireless companies, fixed wireless, satellite, and other competitors continued to expand their footprints and service offerings, further increasing competition.[81]

Here too, AT&T has already committed to offering a DS0 UNE loop replacement product after forbearance is granted at commercially negotiated rates. Accordingly, Telepacific and others will continue to have access to those replacement DS0 loops. Moreover, even if (contrary to fact) forbearance from Section 251(c)(3) resulted in Telepacific exiting the marketplace, most of Telepacific's customers would likely still have multiple competitive alternatives available to them because, as USTelecom has demonstrated, cable companies, CLECs, wireless providers and others

[79] *See* n.37 *supra.*

[80] *See id.*

[81] *See, e.g.,* Verizon Comments at 10-14; Petition at 7-19; Lerner Paper at 9-26.

have deployed facilities-based voice and data networks covering most areas where customers live and work.

Telepacific's only answer is that many of its customers are in rural areas with few broadband alternatives.[82] But, again, Telepacific is incorrectly assuming it will not have access to a commercial UNE loop replacement product. In all events, Telepacific dramatically overstates the potential impact on rural customers. According to AT&T's data, in California and Texas (where Telepacific mainly operates), less than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of the DS0 digital UNE loops it sells are in rural zones, and in Nevada, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** are in rural zones. In other words, it does not appear that Telepacific or any other provider is using UNE DS0 loops to provide DSL service to a significant number of customers in any of those rural areas.

Finally, some Opponents argue that competitors use unbundled DS0 digital UNE loops to provide DSL services in rural areas where the ILECs themselves have chosen not to provide such services, and that granting forbearance will mean that these rural customers lose access to broadband. Again, AT&T has committed to offer a DS0 UNE loop replacement product, so it is not true that CLECs that currently use DSL digital UNE loops to provide DSL will lose access to that input. In any case, it is not at all clear that the CLEC claims are accurate. For instance, the main example provided for AT&T's ILEC footprint is Digital West's assertion that it is **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[82] *See* Telepacific Comments at 30-31.

[83] INCOMPAS *et al.* Opposition, Attachment 6, Buckingham Decl. ¶ 12.

[redacted] **[END HIGHLY CONFIDENTIAL]** Second, even if Digital West were to exit that area, customers would still have multiple alternatives, including fixed wireless and satellite providers offering faster broadband speeds than Digital West claims to offer,[84] and of course the four national mobile wireless providers offer broadband service in that area as well.

C. Dark Fiber Transport.

A few Opponents argue that the Commission should retain the Section 251(c)(3) unbundling requirements for dark fiber transport.[85] But the Commission, after analyzing one of the largest sets of competitive data it has ever collected, recently determined that the marketplace for transport is competitive nationwide, and that the harms of continued pricing regulation of interoffice transport far outweigh any potential benefits.[86]

As explained by the Commission, "as of 2013, competitive providers ha[d] deployed competing transport networks in more than 95 percent of census blocks with special access demand (and about 99 percent of business establishments are in these MSAs)."[87] Accordingly, "competition for TDM transport services is sufficiently pervasive at the local level to justify relief from pricing regulation nationwide."[88] To be sure, this nationwide deregulation could "leave a relatively small percentage of census blocks (with an even smaller percentage of overall demand)

[84] *See* Internet Providers in Bradley, California, https://broadbandnow.com/California/Bradley.

[85] *See, e.g.*, INCOMPAS *et al.* Opposition, Attachment 11, IdeaTek Comments at 2-4 ("IdeaTek Comments"); Sonic Comments at 15-16.

[86] *See BDS Order* ¶ 91.

[87] *Id.* ¶ 79, n.262.

[88] *Id.* ¶ 91.

price deregulated and without the immediate prospect of competitive transport options."[89] However, "greater harm—primarily manifested in the discouragement of competitive entry over time—would result if we were to attempt to regulate these cases than is expected under our deregulatory approach."[90]

The Commission has thus already determined that there are competitive alternatives to ILEC transport on a near nationwide basis, and that maintaining pricing regulation for transport would be counterproductive and affirmatively harmful to the public interest. These findings are dispositive, and Opponents' claims that the Commission should nonetheless retain UNE dark fiber transport can be dismissed on this basis alone.

In all events, the Commission should be skeptical of unsupported claims by IdeaTek and others that dark fiber is their only viable option for reaching end users to which they have deployed their own loops.[91] As the Commission has noted, "[t]ransport services are typically higher volume services between points of traffic aggregation which can more easily justify competitive investment and deployment."[92] If a CLEC can afford to build the more expensive loops to customers, it can afford to build the less expensive transport needed to serve those customers. For example, IdeaTek states that it has deployed more than 1,600 miles of competitive fiber in Kansas.[93] It purchases less than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** miles of dark fiber transport from AT&T in Kansas. IdeaTek thus clearly has

[89] *Id.* ¶ 92.

[90] *See id.*

[91] IdeaTek Comments at 2-3.

[92] *BDS Order* ¶ 77.

[93] *See* IdeaTek, Where We Are, http://www.ideatek.com/kansas-based-fiber-optic-network-solutions/.

the resources to build its own fiber transport where needed, and hardly requires access to AT&T's dark fiber transport facilities. Moreover, to the extent the Commission seeks to subsidize CLEC transport facilities, the better approach is through direct subsidies, as the Commission is already doing.[94]

There is also no merit to claims that competitors rely on UNE dark fiber primarily to reach rural areas. For example, AT&T sells UNE dark fiber transport by zones (urban, rural, suburban) in 16 states. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[94] *See, e.g.*, John Green, *IdeaTek wins federal dollars to expand broadband in region*, Hutchinson News (August 29, 2018), http://www.hutchnews.com/news/20180828/ideatek-wins-federal-dollars-to-expand-broadband-in-region (IdeaTek "will be awarded up to $4.2 million in federal dollars to expand high-speed internet access to large portions so of rural Reno county [in Kansas] over the next decade.").

CONCLUSION

For the foregoing reasons, the Commission should promptly grant the Petition.

Respectfully submitted,

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